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OCA 88-2189
15 June 1988

MEMORANDUM FOR THE RECORD

SUBJECT: Hearing on H.R. 3665, "Official Accountability Act of 1987 Before the Criminal Justice Subcommittee, House Judiciary Committee

1. On 15 June 1988, at 1000 hours, in Room 2237 Rayburn House Office Building, I attended an open hearing on legislation to provide criminal penalities for violations of law by government officials involved in intelligence operations (HR 3665). The open hearing was chaired by Representative John Conyers (D., MI). Also in attendance were Representatives George Gekas (R., PA) and Don Edwards (D., CA).

2. The witnesses were divided into two Panels. Panel I consisted of Professor Loch Johnson, Political Science Department, University of Georgia; Professor Harold Hongju Koh, Yale University School of Law; and Gary Stern, Research Associate, American Civil Liberties Union. They each gave an opening statement (attached). Panel II participants were to be Professor Thomas Franck, Center for International Studies, New York University School of Law; Professor Richard Falk, Center for International Studies, Princeton University; and Professor Jules Lobel, University of Pittsburgh School of Law. Falk and Lobel statements are attached, although I did not attend this portion of the hearing.

3. The Committee broke for a vote, after which they also planned to recess for lunch, so I was unable to stay for the question and answer period.

4. Unfortunately, during the time that I was in attendance at this hearing, there was no mention of whether this bill would move forward anytime in the near future.

STAT [redacted]
House Affairs
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Attachments: a/s

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COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIMINAL JUSTICE

H E A R I N G

RE: H.R. 3665, "Official Accountability Act of 1987"

DATE: Wednesday, June 15, 1988

TIME: 10:00 a.m.

ROOM: 2237 Rayburn House Office Building

W I T N E S S E S

(Decision to Light Order)

PANEL I

- Professor Loch Johnson, Political Science Department, University of Georgia, Athens Georgia;
- Professor Harold Hongju Koh, Yale University School of Law, New Haven, Connecticut; and
- Mr. Gary Stern, Research Associate, American Civil Liberties Union, Washington, D.C.;

PANEL II

- Professor Thomas Franck, Center for International Studies, New York University School of Law, New York, New York;
- Professor Richard Falk, Center for International Studies, Princeton University, Princeton, New Jersey; and
- Professor Jules Lobel, University of Pittsburgh School of Law, Pittsburgh, Pennsylvania

# # #

PREPARED TESTIMONY

AND

STATEMENT FOR THE RECORD

OF

GARY M. STERN

RESEARCH ASSOCIATE

AMERICAN CIVIL LIBERTIES UNION

AND

MORTON H. HALPERIN

DIRECTOR

WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

ON

H.R. 3665

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

HOUSE JUDICIARY COMMITTEE

JUNE 15, 1988

Mr. Chairman,

We very much appreciate this opportunity to testify on behalf of the American Civil Liberties Union on H.R. 3665. The ACLU is a non-partisan organization of over 250,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Bill of Rights.

H.R. 3665 seeks to impose criminal penalties for government officials who commit national security offenses. The ACLU supports criminal penalties for officials who violate the law in the course of their official duties. Criminal penalties reenforce the rule of law as the guiding principle of our democratic government and embolden the precept that no person is above the law. Such penalties first serve to deter those officials, who may be tempted, from engaging in illegal activities. But they also help those officials who may be pressured into an illegal action to resist such pressure by citing the law and the penalties they might incur.

The Iran-Contra affair vividly demonstrated the lengths that government officials will go to circumvent the law for what they believe is a higher purpose, when they feel that they can get away with it. Indeed, Colonel North testified that he was fully willing to be the "fall guy" and take all the political heat when the operation became public, but that never in his "wildest dreams or nightmares" did he envision that he would be subject to criminal liability. Had he known, he likely would not have carried out his covert mission.

It is essential that Congress make the law clear on this issue. Many people, North included, discounted the intent of the Boland amendment by asserting that if Congress had really been serious it would have made it a crime not to violate it. While the indictments handed down pursuant to Judge Walsh's investigation show that the present laws already make it a crime to conduct an illegal covert operation, we believe that the law should now be drafted to apply directly to the conduct of covert action so that future Colonel Norths will be on notice. Accordingly, we strongly support amending the present and pending Intelligence Oversight Acts to include criminal penalties for anyone who engages in a covert operation that does not comply with the reporting requirements.

Yet, criminal penalties deal only with the after effects of an illegal covert operation. They do not, however, get at the more fundamental problem, which is the incongruity of conducting secret covert operations in an open democratic society. Thus, in addition to criminal penalties, we urge the Congress to consider imposing certain substantive limits on the use of covert operations as an instrument of U.S. foreign policy--for example, a statutory ban on assassinations, on the overthrow of democratically elected governments, and, most importantly, a ban on the use or support of covert paramilitary operations.

The ACLU holds the position that the United States should not engage in any covert operations. This position is gaining wider acceptance by many foreign policy specialists. This past

winter, for example, former Secretary of Defense Clark Clifford testified before both the House and Senate Intelligence Committees that "on balance covert activities have harmed this country more than they have helped us," and that "unless we can control covert activities once and for all, we may wish to abandon them."

Covert operations not only make for bad foreign policy, they also invariably subvert democratic government by breeding disrespect for truth and the rule of law. To keep a covert operation secret, government officials must necessarily lie to the public. Once down that road, they are compelled to lie to Congress, to other agencies, and even to one another, not only to keep the secret, but also to maintain control and power over their realm of policy. Having succeeded so well on the path of secrecy and deception, it does not take much for such officials to believe that they can also break the law and get away with it. Such is the story of Iran-Contra, as it was with the secret bombing of Cambodia and the Watergate scandal beforehand, and as it inevitably will be when some future President relies on covert action to conduct foreign policy.

The ACLU has of late spent some time trying to figure out how to translate our opposition to covert action into a concrete legislative proposal. Our conclusion is that as a first step Congress should prohibit the use or support of covert paramilitary operations by requiring that all such operations be publicly debated and Congressionally approved. (I have attached

to this testimony a copy of an article addressing this issue, which I request be included in the record.)

The decision to take sides in a military conflict, in any form, is one of the most important decisions for the government to make. In a democratic society, that decision must be made openly, and must have the support of Congress, whose power it is to declare war. We would argue that Presidents conduct paramilitary operations covertly not to hide the United States's role from the adversary (that fact is virtually impossible to keep secret), but to hide it from the American people and the Congress; covert operations are a convenient and tempting shortcut around the procedural constraints inherent in and demanded by our democratic system.

As Robert McFarlane conceded in his testimony at the Iran-Contra hearings, the President and his advisors "turned to covert action [in Nicaragua] because they thought they could not get Congressional support for overt activities." The same was true in Laos in 1963, Angola in 1975, and Iran in 1985. Henry Kissinger testified to the Church Committee that the President used a covert operation to fight the war in Laos "because it was less accountable." When Congress found out about the Angola operation, it stopped it. Had Congress found out about the sale of weapons to Iran, it almost certainly would have stopped that too.

Conversely, where Congress supports a paramilitary operation, such as the operation in Afghanistan, its public

approval need in no way undermine the continued effectiveness of the program. We would argue that as long as the substantive goals of the operation receive public scrutiny, the operational details--the quantity and quality of the assistance, as well as the names of third countries who do not want their identities revealed--can remain secret.

But, to the extent that Congress continues to permit the use of covert operations, it must do so in accordance with strict reporting and oversight procedures, which should include criminal penalties for the knowing and willful failure to abide by these requirements. Thus the ACLU supports the Intelligence Oversight Act of 1988 as it was reported out of the House Intelligence Committee. That bill represents an important step forward from existing law for purposes of oversight and consultation.

However, the bill faces a serious impediment. An amendment is currently being considered that would for the first time create criminal penalties for the unauthorized disclosure of classified intelligence information--a leak statute. Never before has Congress enacted such a sweeping law that would penalize the disclosure of information to the public or the press. While many members of Congress feel there may be a problem with leaks, this amendment is excessive in the way that it encroaches on Congressional prerogatives as well as on First Amendment rights. Congress should not enact any legislation of this kind without conducting a thorough analysis of the issue in hearings and ensuring full protection for the press.

The Judiciary Committee in particular should exercise its jurisdiction over a criminal leak statute of this kind. I urge Members of this Committee to give careful consideration to this amendment before it is attached to the Intelligence Oversight Act.

Mr. Chairman, I thank you again for holding these hearings and for providing the ACLU an opportunity to testify.

STATEMENT OF DR. LOCH K. JOHNSON

PROFESSOR OF POLITICAL SCIENCE

UNIVERSITY OF GEORGIA

Former Assistant to the Chairman,

Senate Select Committee on Intelligence;

Former Staff Director, Subcommittee on Oversight,

U.S. House Permanent Select Committee on Intelligence

"Foreign Policy and the Rule of Law: Some Historical Notes"

Testimony Before the House Judiciary Subcommittee on Criminal Justice

Representative John Conyers, Jr., Chairman

June 15, 1988

Mr. Chairman, I am honored to be a member of this distinguished panel assembled here to examine a proposed law entitled the "Official Accountability Act" (H.R. 3665). The purpose of this bill, introduced by you on November 20, 1987, is "to provide for criminal penalties for Government officials who commit national security offenses." A consideration of recent foreign-policy violations indicates why a measure like the one you offer is in order. Foreign policy is a vast domain and time is limited, so allow me to focus on intelligence operations--only one portion of whole, yet often at the center of controversy over the abuse of national-security powers.

Democracy and Intelligence

The central theme in my remarks this morning can be stated succinctly: democracy and secret intelligence organizations, despite

their seemingly inherent antithesis, can exist safely and effectively within the same society--but only with the most careful precautions. This tension between the concern of some, on the one hand, about the proper supervision of the intelligence agencies and, on the other hand, a willingness by others to let them operate in full secrecy, lies at the heart of the dilemma addressed by H.R. 3665. "While there is a strong public interest in the public disclosure of the functions of governmental agencies," a senior official in the Central Intelligence Agency (CIA) once put it, "there is also a strong public interest in the effective functioning of an intelligence service."

Democracy and intelligence, in a word, represent values that are in conflict, pulling one against the other. Democracy rests on the assumption that government should be conducted openly, that decision should be preceded by wide public debate, that the rule of law is more trustworthy than the rule of man, that officials ought to be held accountable for their acts. Ours is "a government of laws and not of men," wrote John Adams into the Massachusetts state constitution in 1780. In contrast, intelligence operations depend upon secrecy and limited debate, and often involve the violation of ethics and laws in those countries overseas where U.S. agents operate, as well as the use of tactics or "dirty tricks" that seem far removed from the accepted philosophical tenets of democratic theory--lying, sabotage, even clandestine warfare and assassination in times of peace.

One possible response to the democracy-versus-intelligence dilemma is to eliminate, or sharply curtail, U.S. intelligence operations. Yet, to abolish or emasculate the intelligence agencies would be an act of folly, for while they can--and have--posed a threat to democracy from

within, they also provide a vital protection for democracy against serious threats from abroad. Here is the paradox. And from this paradox comes the central challenge: to guard against intelligence excesses anathema to an open society while, at the same time, holding high the intelligence shield against dangers from beyond these shores.

In the renewed public debate stirred by the Iran-contra scandal of 1986-87, citizens of the United States and their elected representatives must determine what kinds of intelligence operations they are unwilling to allow and what operations the nation must tolerate in order to protect itself in a world filled with enmity, terrorists, and doomsday weapons. Responsible officials--elected and appointed--must guarantee through vigorous program review (oversight) that the nation's spymasters and agents are held accountable and operate firmly within the established boundaries. Under the provisions of H.R. 3665, those individuals who transgress these boundaries would, quite properly, be held criminally accountable for their disregard of the legal standards. The historical records suggests that the deterrent of criminal sanctions may be necessary to curb the excessive zeal of some foreign-policy officials.

Intelligence and the Law: A Stormy History

The modern American intelligence community was established by the National Security Act of 1947, with amendments in 1949. Prior to the Iran-contra affair, the history of these secret agencies reflected a three-staged evolution toward greater democratic control. The first phase, the Era of Trust (1947-74), was a time when the intelligence agencies were permitted almost complete discretion to chart their own courses, free of meaningful scrutiny by overseers in the Congress or

even the White House. This state of benign neglect changed dramatically in the aftermath of a series of articles published in the New York Times throughout December of 1974. These articles charged the CIA with the conduct of unsavory operations against a democratically elected regime in Chile and, more startling, with "massive" spying at home. The American public itself had become the object of the CIA's dark trades, as the Orwellian vision of Big Brother moved from the pages of 1984 to the headlines of the nation's leading newspapers.

The second phase, the Era of Skepticism (1975-76), saw the intelligence agencies reel under the impact of investigations led by public officials on Capitol Hill and in the White House, now suddenly skeptical about the trust they had long placed in America's secret service. Among intelligence officers, this season of inquiry is still remembered painfully as the "Year of the Firestorm" and the time of the "Intelligence Wars." The investigations released a torrent of information on the previously invisible side of American government. The extensive hearings and reports published by the investigators stood several feet high and chronicled, in chilling detail, the dangers posed by the intelligence agencies, when misused. If anyone had forgotten the perils of hidden and unfettered power--despite the still-fresh revelations of the Watergate scandal--here were some unpleasant reminders.

The third phase, the Era of Uneasy Partnership (1976-86), witnessed a closer legislative monitoring of the intelligence community and a heightened public awareness of its mission--a "democratization" of U.S. intelligence policy. The Congress created formal intelligence oversight committees; intelligence budgets underwent scrutiny by legislators and

their staff; hearings on intelligence issues became commonplace; and, new laws tightened legislative supervision over covert action, electronic surveillance, and other important intelligence operations.

The fourth and current phase in the evolution of modern American intelligence, the Era of Distrust (1986-), began with press disclosures in November of 1986 revealing the secret sale of U.S. arms to Iran. Since the House and Senate intelligence oversight commmittees had no knowledge of this operation before the newspaper accounts emanating from the Middle East (replete with their allegations of CIA involvement), the disclosures raised serious doubts among legislators about the intelligence community's willingness to honor the new oversight arrangements. These arrangements required, by law (the Hughes-Ryan Act of 1974 and the Intelligence Accountability Act of 1980), formal reports to the Intelligence Committees on secret arms-sales and other covert actions.

Further charges that the profits from the arms-sales may have been channeled through Swiss bank accounts to finance the <u>contras</u> in Nicaragua, despite an act of Congress (the Boland Amendment) limiting government involvment in the supply of weapons to the counter-revolutionaries, added fuel to the fires of criticism against the CIA gathering strength on Capitol Hill. With the echoes of the 1975-76 intelligence investigations still faintly lingering, the nation took up the debate once more between those who advocated democratic controls over the CIA and its sister agencies and those who favored turning back the clock to the Era of Trust.

This thumbnail historical sketch suggests three broad conclusions. First, intelligence oversight has varied in intensity over the years,

from benign neglect in its earliest stages to a marked assertiveness in 1975 when Congress began to demand a restoration of its authority across the board. Second, in the decade from 1976 to 1986, intelligence policy became more accountable on the whole and, therefore, more democratic--without losing its effectiveness. And, third, the Iran-contra scandal revealed that serious flaws continue to exist in the established precautions against the abuse of power by the intelligence agencies and the National Security Council (NSC). The checks put in place from 1975-80 failed to stop--or even alert Congress to--this unfortunate operation, planned and executed by the NSC staff with support from the CIA. The American experiment in balancing the intelligence mission with accountability had been dealt a serious blow. The search for improved safeguards was taken up again, of which the bill before us is one illustration.

Pathways

In reference to the Bourbons, Chevalier de Panat wrote in a letter to Mallet du Pan in January of 1796: "They have learned nothing, and have forgotten nothing." Though the vast majority of America's intelligence officials have served the nation with honor, skill, and a respect for the law, some evidentally have learned nothing about the importance of accountability and have forgotten nothing about how to evade it. They must be instructed anew. Toward this end, permit me to offer a brief three-point proposal that I think would move the nation toward an improved balance between democracy and accountability in its conduct of national-security policy.

First, Congress must clarify its reporting expectations for foreign-policy initiatives. The requirement of prior notification to

the Congress for all important intelligence operations, as advocated in the 1980 Intelligence Accountability Act (with the possibility of limiting notice temporarily to eight congressional leaders in a time of extraordinary circumstances), remains, in my view, the appropriate standard. If the executive branch fails to inform the Congress in advance of key initiatives, legislators will be unable to evaluate the merits of proposals before they are set in motion. The spirit of the Constitution grants Congress an opportunity for a fair appraisal, not simply a fait accompli.

Second, Congress should institute legal sanctions against those who refuse, as the Chairman has put it, "to abide by the principles of legality" in the conduct of foreign policy, and against those who lie to congressional panels (or withhold the truth, which amounts to the same thing). Here is where H.R. 3665 comes in to play. Its section on "Prohibitions" (Sec. 2902) ought to underscore congressional insistence that the nation's laws must be obeyed by government officials. I would only modify the language slightly to include: " . . . shall order, engage, or otherwise encourage the planning of . . . ." This would help emphasize the point that the NSC staff (and other entities) should not encourage private individuals and foreign countries to violate U.S. law on its behalf, as occurred during the Iran-contra episode.

In Section 2904 ("Sanctions"), the Subcommittee may want to strengthen (b)(1) with stiffer penalties, say, "may be imprisoned for not less than one year nor more than ten years and may be fined not more than $100,000 and, as an alternative to imprisonment, may be sentenced to an equivalent period of civilian work . . . . " I commend the Chairman and the other Subcommittee members for the leadership they have

provided with this useful measure to restore credibility to the nation's national-security statutes.

Third, and a larger problem that passage of H.R. 3665 should help address but which it cannot alone correct, lies in the continuing unwillingness of some executive officials to honor the procedural safeguards already in place, and, as the Inouye-Hamilton Committee put it, to "deal in a spirit of good faith with the Congress." When asked by congressional investigators on that panel why he had withheld information from the Intelligence Committees about the secret sale of arms to Iran, the President's assistant for national security affairs, Vice Admiral John M. Poindexter, responded: "I simply didn't want any outside interference."

Even months after the embarrassing revelations of the Iran-contra investigation, and following his own admission that he, too, had lied to Congress, the Assistant Secretary of State for Latin American, Elliott Abrams, had the gall to declare publicly that a recently issued CIA reprimand against one of its officers who had also lied to Congress "would send exactly the wrong signal to young officers at the Agency." In fact, it sent precisely the right signal--the same one presented by H.R. 3665: that improper acts carry penalties. If a "wrong signal" has been sent, surely it comes from Abrams's continuance in office, despite his apparent deep-seated attitude of disdain toward the entire concept of congressional accountability.

Looking back over the events of the Iran-contra scandal, President Jimmy Carter's national security adviser, Dr. Zbigniew Brzezinski, recalled that withholding information about important intelligence operations from the president (as evidentally occurred during the

Iran-contra affair) " . . . . simply didn't occur to us. There was, if you will, a legalistic, an ethical mind-set which simply precluded that as a possibility . . . ." Similarly, Carter's former CIA Director, Admiral Stansfield Turner, underlines the significance of "the tone you set in office . . ." In venturing an explanation as to how the Iran-contra excesses could have occurred, President Ronald Reagan's former Secretary of State, Alexander Haig, has commented: "An atmosphere was created . . ." The importance of a sensitive to law and propriety among government officials can hardly be stressed enough. As always, the quality and integrity of office-holders, along with their attitudes toward Congress and the give-and-take that is the hallmark of democracy, will determine in large measure how well America's experiment in self-government works.

A Challenging Agenda

In light of this nation's ongoing need for an effective intelligence service in a dangerous world, the objective must be not to ban important foreign operations but--in so far as possible--to bring them within a democratic framework. The remedies are well-known, though difficult: at every level in the government, accountability will continue to depend upon clear guidelines, timely reporting, honest officials, and dedicated overseers willing to invest the time required to review the conduct of foreign policy--through hearings, audits, inspections, and less formal discussions with a range of government officials. To this list, H.R. 3665 adds another vital ingredient: penalities for those who insist on the adoption of their will over the public's will. And overarching these presciptions must be a spirit of cooperation between foreign policy leaders in the executive and the

legislative branches--the "good faith" extolled by the Inouye-Hamilton panel. With this mixture, a challenging but reachable goal, the United States can enjoy both democracy and national security.

Thank you, Mr. Chairman.

Statement of

HAROLD HONGJU KOH
Associate Professor of Law, Yale University

On H.R. 3665, the Official Accountability Act
Before The

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIMINAL JUSTICE

June 15, 1988

Chairman Conyers and members of the Subcommittee:

I am grateful for this opportunity to offer you my views on H.R. 3665, the Official Accountability Act, and more broadly on the need for new national security legislation in the wake of the Iran-Contra Affair. I am an Associate Professor of Law at the Yale Law School, specializing in international law and the Constitution and Foreign Affairs. Before coming to Yale, I served from 1983 to 1985 as an Attorney-Adviser at the Office of Legal Counsel of the Department of Justice, where I worked primarily on matters relating to international and foreign affairs law.

Let me first applaud both the Subcommittee and its chairman for holding these hearings, which are long overdue. I am in the process of completing an article that will appear shortly in the Yale Law Journal, which analyzes the recently completed House and Senate Select Committee investigations of the Iran-Contra Affair.[1] In that article, which I will submit upon publication as a supplement to this testimony, I argue that two competing conventional wisdoms about the Iran-Contra Affair have recently taken hold among Members of Congress and the American public. The first,

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[1] See Koh, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair," 97 Yale L. J. ___ (No. 7) (forthcoming June 1988).

suggested by the reports of both the Tower Commission and the majority members of the Iran-Contra Committees, is that the Iran-Contra Affair resulted primarily from a failure of people, not laws.[2] Under this view, Congress need not now consider new national security legislation, because, in the majority's words, "Congress cannot legislate good judgment, honesty, or fidelity to law."[3]

A second, contradictory conventional wisdom, which the Iran-Contra committees' minority members have asserted, is that the Iran-Contra hearings represented yet another effort by Congress to "micromanage" foreign policy by legalizing foreign policy differences between the political branches of the government. According to this view, a congressional effort to enact new national security legislation would not only be unnecessary, but in the minority's words, either "unconstitutional and unwise" or "unconscionably meddlesome."[4]

In my judgment, both of these conventional wisdoms are false. The first suggests that new laws are unnecessary because our national security system is ultimately self-regulating; the second suggests that we need no

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[2]See Report of the Congressional Comms. Investigating the Iran-Contra Affair, S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 423 (1987) [hereinafter Iran-Contra Report.]("the Iran-Contra Affair resulted from the failure of individuals to observe the law"); President's Special Review Board, The Tower Commission Report 4 (New York Times ed. 1987) ("The problems we examined in the case of Iran/Contra caused us deep concern. But their solution does not lie in revamping the National Security Council system.").

[3]Iran-Contra Report, supra note 2, at 423. The vast bulk of the 690-page Report recounts facts and legal violations, with only four and one-half pages of the majority report and three pages of the minority report discussing recommendations for legislative reform. See id. at 423-27; 583-85.

[4]Id. at 583 (minority report).

new laws because that system is currently over-regulated. I disagree with both conclusions. In my view, the Iran-Contra Affair revealed that our national security system is inadequately regulated. The Affair stemmed neither from bad people violating good laws (as the various investigators concluded), or from good people violating bad laws (as some Administration supporters have maintained), but from misguided people violating ineffective laws. If, as I believe, the Iran-Contra Affair resulted not just from a failure of legal enforcement, but a more fundamental failure of legal structure, then the time is now ripe for Congress to undertake a systematic reconsideration of the proper relationship between the President, Congress, and the courts in foreign affairs. Let me explain my conclusion by first outlining my view of the proper precedent, problem, and prescription for the Iran-Contra Affair, and second, by briefly evaluating the merits and demerits of the current proposal.

I. The Precedent

A common misperception among many Members of Congress and the media has been that the historical precedent for "Contragate" was Watergate. But if one looks back not at the history of presidential scandals, but across the spectrum of recent U.S. foreign policy concerns -- war powers, treaty affairs, emergency economic power, arms sales, military aid, and covert operations -- one recognizes that the relevant historical precedent for the Iran-Contra Affair was not Watergate, our most recent presidential scandal, but rather, Vietnam, our most memorable foreign policy failure.[5]

In almost every important realm of foreign policy, a growing pattern

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[5]A brief history of each of these areas is provided in Koh, supra note 1.

of executive dominance in foreign affairs -- the so-called "Imperial Presidency" -- contributed to the Vietnam disaster. After Vietnam, Congress spent the balance of the decade passing many curative statutes, whose names are familiar to all of us: to regulate war powers, the War Powers Resolution[6]; in treaty affairs, the Case-Zablocki Act[7]; in the area of emergency economic power, the International Emergency Economic Powers Act[8] and the National Emergencies Act;[9] in arms sales, the Arms Export Control Act of 1976;[10] in military and paramilitary aid, the Hughes-Ryan Amendment to the Foreign Assistance Act,[11] and in foreign intelligence, the Intelligence Oversight Act of 1980.[12]

II. The Problem

Accepting that Vietnam and not Watergate was the precedent for the Iran-Contra Affair, the real problem the Affair exposes is that the pattern of executive avoidance of legislative constraint in foreign affairs which led to Vietnam continues even today. What is most striking about the Iran-Contra Affair is that it happened even though all of these post-Vietnam era statutes were on the books. In each of these statutes, Congress sought to impose upon the President certain restrictions whose basic premises he

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[6] 50 U.S.C. §§ 1541-1548 (1982).

[7] See Transmittal Act, 1 U.S.C. § 112b (1982)(Case-Zablocki Act).

[8] 50 U.S.C. §§ 1701-1706 (1982).

[9] 50 U.S.C. §§ 1601-1651 (1982).

[10] International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2751-2796 (1982).

[11] 22 U.S.C. § 2422 (1974).

[12] 50 U.S.C. § 413 (1982).

apparently did not accept. Although the President signed nearly all of these statutes, during the Iran-Contra Affair executive branch officials either jumped through their loopholes or simply violated them.

This pattern has occurred not only in the spheres of covert operations and military aid, in which the Iran-Contra Affair occurred, but also in other areas of U.S. foreign policy. In 1973, Congress passed the War Powers Resolution to require the President to report and consult with Congress before committing and maintaining U.S. armed forces in hostile situations abroad, but today, more than a year after the Iraqi attack on the U.S.S. Stark, Congress has still to receive a formal War Powers report from the President regarding U.S. activities in the Persian Gulf. In 1972, Congress passed the Case-Zablocki Act to enhance congressional involvement in treaty affairs, but in recent years we have witnessed this Administration's attempt to "reinterpret" the 1972 Anti-Ballistic Missile Treaty without congressional input, in order to accommodate the Strategic Defense Initiative. In 1976 Congress passed the Arms Export Control Act to ensure congressional participation in approving major arms sales, but even after the Iran-Contra Affair the Administration has tried to sell advanced weapons to Middle Eastern countries over substantial congressional objections.

In short, the Iran-Contra Affair is only the tip of a much larger iceberg that germinated during the Vietnam War. It was Vietnam that spurred Congress to pass the War Powers Resolution in an attempt to regulate overt executive warmaking. But the Resolution only drove overt warmaking underground, stimulating the Executive to substitute covert for overt operations and to transfer control of those operations from the

military establishment to the intelligence agencies, particularly the CIA. Congress' regulation of the CIA through special oversight committees then led that agency during the Iran-Contra Affair to shift some of its activities to an unregulated entity, the National Security Council (NSC). When the NSC staff found its own resources inadequate to execute those covert operations, it subcontracted its duties to private agents and financed the payments with contributions from private parties and foreign governments. Existing congressional restrictions on overt arms sales then led NSC officials and their delegates to sell arms to Iran covertly. And after the Boland Amendments[13] restricted official U.S. funding to the contras, military aid was privatized. In short, the Iran-Contra Affair illustrates a pattern familiar to any government regulator: each succeeding congressional effort to catch up with executive evasion of legislative controls has served only to shift executive activity into new patterns of evasion.

What all of this suggests is that the Iran-Contra Affair exposed systemic, rather than localized, problems in the American foreign policy process. Congress' general effort after Vietnam to reassert its constitutional role across the many spheres of foreign policymaking has not succeeded. The real unanswered questions of the Iran-Contra Affair, therefore, are not questions of individual responsibility -- "what did the President (or for that matter, the Vice-President) know and when did they

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[13]The Boland Amendments, which were attached to successive appropriations bills between 1982 and 1986, generally prohibited the expenditure of funds "available" to any "entity of the United States involved in intelligence activities" for assistance to the "Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua." See Iran-Contra Report, supra note 2, at 395-407 (cataloging various amendments).

know it?" -- but rather, a more basic structural question: "why hasn't Congress been able to force the President to keep his bargains in foreign affairs?" Or, to put it another way, "why does the President continue to win in national security affairs?"

The answer to that question, I would argue, lies in a combination of three institutional factors that mirror general characteristics of the Executive, Legislative, and Judicial Branches: what I will call Executive Initiative, Congressional Acquiescence, and Judicial Tolerance. First, and most obviously, the Presidency has won because it has institutional incentives to take the initiative in foreign affairs, and in fact has often done so by construing laws that were enacted to constrain executive authority as authorizing its actions. Second, the President has won because Congress has persistently acquiesced in what he has done, which in institutional terms means that it has only rarely succeeded in forcing votes on joint resolutions that challenge the President's foreign policy actions and overriding his vetoes by more than a two-thirds vote in each house. Third and perhaps most important, the President has won because the federal courts have usually tolerated his acts. The courts have condoned the President's initiatives in two ways: either by hearing those challenges on the merits and ruling in favor of the President,[14] or more frequently, by refusing to hear congressional or private challenges brought against those acts on the ground that the plaintiff lacks standing; the defendant is immune; the question is nonjusticiable, not ripe, or moot; or that

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[14] See, e.g., INS v. Chadha, 462 U.S. 919 (1983); Dames & Moore v. Regan, 453 U.S. 654 (1981).

relief is inappropriate.[15]

The result of this three-part combination of executive initiative, congressional acquiescence, and judicial tolerance is that in almost every case, the President wins. If the executive branch possesses statutory or constitutional authority to act and Congress approves or acquiesces in his initiative, the President wins. If Congress does not acquiesce, but lacks the political will either to cut off appropriations for an act or to sustain a joint resolution opposing that act over a presidential veto, the President again wins. If a Member of Congress or a private individual attempts to challenge the President's action in court, the courts will likely refuse to hear that challenge on justiciability grounds. And even if the plaintiffs somehow surmount all judicial obstacles and persuade the courts to hear their challenge on the merits, the courts will usually rule in the President's favor. So whatever the scenario, the bottom line is the same: the President almost always seems to win in foreign affairs. As the Iran-Contra Affair illustrates, over time this state of affairs has increasingly insulated executive branch judgments from external scrutiny by either Congress or the courts, making it increasingly difficult to hold executive officials accountable for their acts.

III. The Prescription

If these are the precedent and the problem, what policy prescription would prevent future Iran-Contra Affairs? Although the Tower Commission and the Iran-Contra committees focused almost entirely on the institutional sources of executive adventurism within the executive branch, my analysis

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[15] See, e.g. Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.C.D.C. 1987).

suggests that any legislative effort should also focus on the sources of undue congressional acquiescence and judicial tolerance, which have contributed equally to recent executive excesses. To succeed, new legislation must seek to restore the constitutional equilibrium of the national security system not only by restraining the Executive, but also by increasing the participation of both Congress and the courts in foreign policy decisionmaking, thereby revitalizing those branches as institutional counterweights to the President.

I do not say this to encourage either congressional micromanagement or imprudent judicial activism in foreign policy matters. All I am saying is that any new legislation should aim at reducing the isolation that currently surrounds executive branch activities, enhancing internal executive branch deliberations, and increasing congressional-executive dialogue while basic foreign policy objectives are being set and particular policy initiatives are being implemented.

How, concretely, should this be done? Although the bill before us laudably tries to promote some of these ends, I think the Iran-Contra Affair demonstrates that even more ambitious legislation is necessary. What we really need is a new national security "charter" -- what Professor Gerhard Casper has called "framework" legislation[16] -- that would attempt

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[16] "[C]onstitutional 'framework' legislation . . . interprets the Constitution by providing a legal framework for the governmental decisionmaking process." Casper, "Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model," 43 U. Chi. L. Rev. 463, 482 (1976). Accord Casper, "The Constitutional Organization of the Government," 26 Wm. & Mary L. Rev. 177, 187-93 (1985)(including National Emergencies Act of 1976, Congressional Budget and Impoundment and Control Act of 1974, and War Powers Resolution as examples of such framework statutes).

to reorganize the policymaking process across several fields of foreign affairs. To those who would say that Congress could never agree upon such omnibus national security legislation, let me point out that Congress enacted precisely this kind of charter legislation forty years ago, when it passed the National Security Act of 1947. That statute created the National Security Council, the Central Intelligence Agency, the Joint Chiefs of Staff, and the Department of Defense. In 1947, Congress made one great error: it failed to define either its own role or the role of the courts in the national security system. Although Congress partly redressed those omissions in the laws it passed after Vietnam, I would argue that the time is now ripe for a new National Security Reform Act of 1988 -- like the Tax Reform Act of 1986, the Gramm-Rudman-Hollings budget reform legislation, or the Trade Reform Act that Congress is still attempting to pass -- which would redefine the role that all three branches play in our national security system.

How broad should such legislation be? Ideally, such a framework statute would replace the patchwork of statutes, executive orders, national security decision directives, and informal accords that currently govern national security affairs by reenacting in five separate titles the War Powers Resolution, the International Emergency Economic Powers Act, the Arms Export Control Act, the Intelligence Oversight Act, and the provisions of the 1947 National Security Act that govern the structure and operation of the National Security Council. At the same time, the charter should repeal other obsolete statutes, such as the so-called "Hostage Act of 1868,"[17] to which Oliver North made reference during the Iran-Contra

[17] 22 U.S.C. § 1732 (1982).

Affair, and address questions regarding congressional-executive consultation in the making of international agreements, internal intelligence agency control procedures, and judicial review of executive action in foreign affairs.

Now is not the time to detail every provision of such a national security charter; my forthcoming article suggests a number of specific legislative reforms that I believe Congress should consider. To encourage fuller internal executive branch examination of the legality of proposed covert actions, for example, I suggest a general statutory requirement of interagency review of executive branch legal opinions that authorize covert actions. To lessen congressional ignorance of or acquiescence in executive acts, I recommend the creation within Congress of a core group of Members -- perhaps the majority and minority leaders of each House and the chairmen and ranking members of the existing armed services, foreign affairs, intelligence, and judiciary committees -- with whom the President and his staff could regularly meet and consult on national security matters. I also suggest a formalized committee practice of filing written "counter-reports" either accepting or rejecting the President's legal justification for each war powers report or intelligence finding, to create a written record against which Congress may test executive claims of congressional acquiescence. To authorize more frequent judicial consideration of challenges to executive conduct, I would recommend that new legislation contain "congressional standing" provisions of the type that Congress recently placed in the Gramm-Rudman-Hollings budget-balancing bill,[18] a

[18]Congressman Synar invoked this clause to bring his successful challenge to that legislation. See Bowsher v. Synar, 106 S. Ct. 3181 (1986). To limit an influx of litigation,

statutory cause of action to challenge violations of the omnibus law, and provisions stating that violations of the national security statutes do not constitute nonjusticiable "political questions" that courts can abstain from deciding. Finally, to make these reform proposals more palatable to the President, I would suggest that Congress couple them to provisions that expressly authorize the President to engage in activities for which he currently lacks express statutory authorization, for example, to commit troops overseas for the short-term purpose of rescuing endangered U.S. citizens, or to authorize the use of covert operations under certain carefully specified circumstances.

IV. The Current Proposal

Let me comment briefly on where the bill before us, H.R. 3665, fits into this broader picture. As drafted, this bill would impose criminal penalties upon U.S. government officials or persons receiving direct or indirect compensation from the United States who "order or engage in the planning of, preparation for, initiation or conduct of any intelligence activity which violates any statute or Executive Order in force or international agreements to which the United States is a party". Furthermore, the bill denies defendants the defense of superior orders unless they "did not know and could not reasonably have been expected to know that the act ordered was unlawful."

I understand that other witnesses will speak to the constitutionality of the bill, which encompasses both Congress' authority under the Constitution to enact it and the bill's consistency with the President's

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Congress could impose a statutory requirement that such suits not be brought until an individual Member had adopted his or her legislative remedies.

foreign affairs authority and a criminal defendant's entitlement to due process of law. If you wish, I would be happy to express my own views on those issues in response to your questions. Let me speak to two different issues: the bill's wisdom as a matter of public policy and its enforcement mechanisms.

As a matter of public policy, I favor statutes that impose criminal penalties on private adventurism abroad conducted at the Executive's behest; one venerable example of such a statute is the Neutrality Act of 1794, which prohibits private expeditions against nations with whom the United States is at peace.[19] In Dellums v. Smith[20], the executive branch argued that Congress never intended to extend the Neutrality Act's provisions to acts of government officials. Although the Court of Appeals in Dellums never reached that issue, this bill, if passed, would have the salutary effect of unambiguously stating Congress' intent to subject executive officials to criminal liability for knowing unlawful acts. Thus, the bill's main advantage is that it would provide judicially enforceable remedies for executive violations of the foreign affairs laws.

When I said earlier that Congress has too often "acquiesced" in the President's actions, I meant in part that Congress has too frequently employed ineffective legislative tools to control executive adventurism. Most of the post-Vietnam era statutes I have described used procedural devices to bring executive action under control, such as sunsetting, reporting and consultation requirements, committee oversight procedures,

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[19] 18 U.S.C. §§ 959-61 (1982).

[20] 573 F. Supp. 1489 (N.D. Cal. 1983), rev'd, 797 F.2d 817 (9th Cir. 1986).

legislative vetoes, and appropriations limitations. But as you know, in 1983, the Supreme Court struck down the legislative veto.[21] In the Iran-Contra Affair, we discovered that reporting and consultation requirements do not work and that even committee oversight devices, such as requirements of written findings, and appropriations limitations, such as the Boland Amendment, can be circumvented by executive officials who are intent upon evading them. When executive officials act unlawfully, none of the congressional control devices currently in use impose direct costs on them, as this bill would do.

My major concern about the bill, as currently drafted, is that it extends beyond this narrow and desirable purpose to chill other types of legitimate activity. The bill nowhere defines its most crucial term, the phrase "intelligence activity." By holding liable private persons who conduct any business with the United States that "results in . . . a violation" of the bill, the law imposes a heavy burden on private persons to familiarize themselves with all statutes, Executive Orders, or international agreements of the United States and might dissuade them from doing business with the U.S. for fear of later prosecution. The bill leaves unclear whether a government official who plans activity that will violate a statute which is about to expire, for example, an appropriations rider such as the Boland Amendment, can be criminally charged for his or her actions. Moreover, by criminalizing acts that plan or prepare to violate Executive Orders "in force," the bill may freeze into the criminal law Executive Orders that will soon be rescinded. For example, the private bankers, Federal Reserve Board officials, and executive branch officials

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[21] See INS v. Chadha, 462 U.S. 919 (1983).

who planned the transfer of funds to Iran that secured the release of American hostages in 1981 could arguably have been charged under this bill, because their activities during 1980 planned transfers that were not permitted by the presidential freeze orders that were then in force.[22]

Similarly, I am troubled by the breadth of the provision that criminalizes intelligence activities which violate "international agreements to which the United States is a party". It is well-established that Congress may validly enact a statute that violates, or makes it impossible for the United States to carry out, our obligations under an international agreement.[23] One recent controversial example may be the so-called Grassley Amendment to Foreign Relations Authorization Act of 1988,[24] ordering the closure of the Palestine Liberation Organization missions in the United States, which arguably violates the United Nations Headquarters Agreement of 1947.[25] If executive branch officials took secret action pursuant to such a statute to enforce its terms, they could conceivably be charged under this bill, and would not clearly be exempted even if the statute were later held unconstitutional or the agreement were later validly terminated.

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[22]See Exec. Orders No. 12,276-82 (1981), reprinted in 50 U.S.C. § 1701 note (1982) (ordering transfer of frozen assets to Iran and revoking prior executive orders prohibiting such transfers).

[23]See Restatement (Third) Foreign Relations Law of the United States § 115 & comment a, § 339 & comment a (1988).

[24]See Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§ 1001-05, 101 Stat. 1331, 1406-07 (codified at 22 U.S.C. §§ 5201-03 (1988)).

[25]Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of June 26, 1947, 61 Stat. 3416, T.I.A.S. 1676, 11 U.N.T.S. 11.

Finally, I am concerned about the provision in the bill generally denying defendants the defense of superior orders unless they "did not know and could not reasonably have been expected to know that the act ordered was unlawful." While that provision spares true underlings from criminal prosecution,[26] it does hit hard at high executive officials just below the President who are charged with making countless daily decisions that tread the lines drawn by various noncriminal provisions of the U.S. Code. While the Iran-Contra Affair revealed the dangers of permitting such brinkmanship, Congress should also take care not to overdeter officials and chill vigorous decisionmaking, thereby encouraging excessive executive timidity in foreign affairs.

With regard to the bill's enforcement, let me make three brief observations. First, I cannot support proposed section 2904(a), which would impose the penalty of leave without pay on a defendant based solely on probable cause of guilt, without providing for recompense if the prosecution later failed to prove guilt beyond a reasonable doubt. Second, either the statute itself or the legislative history should attempt to reconcile the standard for invoking the superior orders defense with the standard for official immunity for civil damages set forth by the Supreme Court in its 1982 decision in Harlow v. Fitzgerald.[27] If that judicially

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[26] Cf. U.S. v. Barker, 546 F.2d 940, 954 (D.C. Cir. 1976) (holding that two Watergate burglars may defend against criminal charge on the ground that they had reasonable belief that superior who solicited their aid was duly authorized officer of the law).

[27] 457 U.S. 800, 818 (1982)(executive officials other than the President are immune from civil damages for official acts "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

created civil immunity standard equates with this statutory standard for criminal defense, I would ask why the criminal standard is not more generous. If the two standards differ, I would desire clarification of exactly how they differ. Finally, the drafters may wish to address an issue raised in Dellums v. Smith, which I have already mentioned: whether private citizens should have standing to challenge a refusal by the Attorney General to conduct the preliminary investigation required under the Independent Counsel Act to determine whether officials covered by this bill violated its provisions in a particular case.[28]

Let me caution that none of these objections are fatal. Most of them would be cured by revising the bill to add more detailed provisions on enforcement, a clearer definition of "intelligence activity" and the terms "planning of" and "preparation for" such activity, and clarification of the provision regarding executive orders and international agreements, which I understand other witnesses will shortly address. To reiterate, let me say that while memories of the Iran-Contra Affair remain fresh, I believe that Congress should seek to enact broader and more ambitious corrective legislation than this, namely, a comprehensive national security charter that would restructure the incentives that executive branch officials face when they consider whether to violate or circumvent existing foreign affairs laws. In modified form, the legislative proposal before us could constitute an important piece of that national security charter.

V. Conclusion

The Iran-Contra Affair has presented Congress with a window of

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[28]In Dellums, the U.S. Court of Appeals for the Ninth Circuit concluded that private plaintiffs lacked such standing. See 797 F.2d 817 (9th Cir. 1986).

opportunity to reassert itself in the foreign affairs policymaking process that it has not had since 1974. At that time, Congress exploited its opportunity by legislating a broader ongoing role for itself across the realms of foreign policy, a role which the executive branch has since sought systematically to undercut. Since the Iran-Contra Affair, Congress has squandered its new opportunity to draft and pass a new national security charter. If Congress wishes to preserve its role in national security policymaking, the time could not be more ripe for it to seize the legislative initiative.

To those who say that only a professor could think it politically possible to draft and enact such wide-ranging legislation, let me note that legislative proposals exist, the only need is for congressional interest. Even as we speak, Senator Cohen's bill to amend the Intelligence Oversight Act has passed the Senate with sufficient votes to override a presidential veto and Congressman Stokes' companion bill has been reported out of the House Intelligence Committee.[29] Senators Byrd, Nunn, Warner and Mitchell have recently offered a promising bill to amend the War Powers Resolution.[30] Senator Biden and Congressman Levine have proposed

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[29]See H.R. 3822, 100th Cong., 2d Sess., 133 Cong. Rec. H11866 (daily ed. Dec. 18, 1987)(introduced by Congressman Stokes); S. 1721, 100th Cong., 2d Sess., 133 Cong. Rec. S12852 (daily ed. Sept. 25, 1987) (introduced by Senator Cohen). At this writing, the Senate bill has passed the Senate by a vote of 71-19. See N.Y. Times, Mar. 16, 1988, at A8, col. 4. The House bill has been marked up and reported out of the House intelligence committee, and is awaiting action by the House Foreign Affairs Committee, to which it has been jointly referred. See "'Iran-Contra' Bill Moves Closer to Passage," First Principles, May 1988, at 9.

[30]See S.J. Res. 232, 100th Cong., 2d Sess., 133 Cong. Rec. S6239 (May 19, 1988) (requiring the President, before using force, to consult with "Gang of Six" consisting of the majority

legislation to amend the Arms Export Control Act.[31] And Senator Specter has proposed several bills that would create a politically appointed director of national intelligence, reform the congressional intelligence committees, and install an independent inspector general at the CIA.[32] What Members of Congress must recognize is that all of these proposals should be integrated because they address different facets of the same problem: the need to restore the constitutional and institutional balance in foreign affairs. Even if only partially successful, a congressional attempt to consider omnibus legislation along these lines would at least focus national attention on the right precedent, problem, and prescription. In the same way as the Gramm-Rudman-Hollings Budget-Balancing Act and the War Powers Resolution constituted first cuts at constitutional line-drawing in their respective fields, so too would new omnibus national security legislation redefine the way we think about national security law.

In my judgment, such a legislative effort could take place any time during the early years of the next Administration. A Republican President eager to engage in such an exercise could use the concept of a national security charter as a way of putting the Iran-Contra Affair behind him; a Democratic President could use it as a means of declaring his seriousness

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and minority leaders of both Houses, the Speaker of the House and the President pro tempore of the Senate and to maintain continuing consultations with "permanent consultative group" composed of the Gang of Six, plus the chair and ranking minority member of the Armed Services, Foreign Affairs, and Intelligence Committees of each House).

[31] S. 419, 100th Cong., 1st Sess. (1987); H.R. 898, 100th Cong., 1st Sess. (1987).

[32] See S. 1818, 100th Cong., 1st Sess. (1987); S. 1820, 100th Cong., 1st Sess. (1987).

about foreign policy reform. But even if the impetus for national security reform does not come from the presidential candidates, there seems no reason why it should not come from Congress itself. Congress has recently led many recent broadscale legislative reform efforts: for example, the Tax Reform Act of 1986, the deregulation movement of late 1970's, and the environmental reform movement of late 1960's. The problem of national security reform is at least as important as any of these. Many notable foreign affairs reforms, including the 1986 South African sanctions bill, the Trade Act of 1974, and the War Powers Resolution, passed into law without significant presidential leadership or over presidential opposition. Even without strong presidential leadership, a Congress committed to bipartisan national security reform could pass a legislative charter that would redefine the allocation of national security responsibility between the branches for the next forty years.

The release of the Iran-Contra Committees' report last fall should have marked the beginning, not the end, of Congress' efforts to deal with the national security crisis exposed by the Iran-Contra Affair. Let me close by quoting Justice Jackson's concurring opinion in Steel Seizure Case, which I think admirably summarizes our present situation: "A crisis that challenges the President equally, or perhaps primarily, challenges Congress. . . . We may say that power to legislate . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[33]

Thank you very much for your attention.

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[33]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (Jackson, J., concurring).

Hearings on H.R. 3665, The Official Accountability Act
Subcommittee on Criminal Justice of the Judicial Committee
U.S. House of Representatives

Official Accountability and International Law: Some Observations

June 15, 1988

Statement of Richard Falk
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I

At the end of World War II there was a strong consensus, then led by the United States Government, that it was of great public importance to extend notions of criminal accountability to those who acted on behalf of the state, yet in violation of international law. Although this consensus was built upon the bedrock of opposition to practices prevalent in Nazi Germany and Imperial Japan, it was also forward-looking. In the course of his celebrated opening statement at the Nuremberg tribunal, Mr. Justice Jackson speaking as the chief U.S. prosecutor, made this famous assertion: "And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve any useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment."

This expression of a commitment to extend ideas of official accountability in the war/peace area to the postwar reconstruction of international political life was widely accepted at the time as necessary, desirable, and possible. It was on this basis, and again on the basis of U.S. leadership, that the outcome of the Nuremberg (and Tokyo) experiences were codified as generally operative principles of positive international law, first in the form of a unanimously endorsed resolution of the United Nations General Assembly (General Assembly Resolution 95 I), later authoritatively reformulated by the highest expert body, the International Law Commission. Few international law specialists would question the binding character of these Nuremberg Principles, which rest on the central proposition that individuals serving in governmental capacities cannot excuse violations of international law in the area of national security

policy by invoking "national interests" or the "superior orders" of political and military leaders, including those of a head of State.

This conception of accountability to governing rules of international law has been formally extended to govern the operations of U.S. armed forces. In the U.S. Army Field Manual, issued in 1956, obligations are set forth in provisions §§498-511. It seems significant that the manual, "an official publication of the United States Army," accepts duly ratified international treaties as determinative of legal obligations: "..their [i.e. treaty] provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof." In effect, by such a formulation, there is already present a firm legal obligation to conduct all government operations within a framework of constraints established by duly ratified international treaties.

Several more specific principles are expressed clearly in the manual: superior orders are not an acceptable legal defense; the obligations to uphold rules of international law are not waived by battlefield necessities or the imperatives of war; and the absence of a punishment for the offense in domestic law does not relieve an individual of responsibility under international law. In §510 entitled "Government Officials," the language is peculiarly pertinent to the matters before this committee: "The fact that a person who committed an act which constituted a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act." If such a legal framework exists for those who serve in the military and face the strongest pressures to abandon the restraints of law, it would seem strange to exempt their civilian

counterparts who are associated with intelligence activities that have often had the character of military or paramilitary undertakings.

Although shrinking back from the implications, the various official responses to the Iran/contra disclosures, including the Tower Commission Report and President Reagan's main response in the form of a nationally televised address on March 4, 1987, accept the notion that government operations in the national security field impose legal accountability upon all those who take part. Mr. Reagan strongly endorsed the view that principles of legality should prevail even when the activity was within the domain of national security and of a necessarily secret character (as, for instance, certain negotiations for the release of hostages held in foreign countries).

At the same time, the public discussion of law in the setting of Iran/ contra seemed to be concerned only with adherence to domestic law, including broad constitutional notions of separation of powers. Even the congressional committee of investigation, in its interrogation of Colonel North, and others, seemed to back away from those issues of accountability that flow from international treaty obligations.

II

Here, then, is the nub of the problem. There is an undoubted formal and technical acceptance of official accountability as informed by international treaty obligations, but there is an equally impressive reluctance to implement these obligations in any effective manner. This reluctance, it should be fully acknowledged, runs deep, particularly in relation to issues of national security. Against the claims of law is the dual sense that efficiency in foreign policy requires governmental

discretion to do whatever helps produce victory and that the adversaries of the United States are not constrained by deference to international law. Underneath these widely held views is the belief that international law is not truly law, and that "the game of nations" unfolds in a jungle--in the end, only the play of unfettered forces count. Such attitudes are not new, but the prolonged urgencies of the Cold War carried on beneath the shadow of a possible nuclear catastrophe, have tended over the years to convert the doctrine and practice of national security into a corpus of behavior that is virtually unchallengeable by reference to international law.

Is this a desirable state of affairs to accord lip service to official accountability under international treaty law, but to grant an exemption in practice? The issues posed raise both matters of prudence and of principle. Would the United States be truly disadvantaged in international affairs by adopting a policy of implementing notions of official accountability? An affirmative answer would have to show from the record two things: that the United States has benefitted from past practices of international lawlessness and that the Soviets both engage in such practices and would likely take advantage of any U.S. disposition to become more law-abiding.

It is a matter of judgment, but I would submit as a student of U.S. foreign policy in this period, that the costs of "lawlessness" have far outweighed the gains. Such an assessment is based both on the longer term consequences of "successful" interventions (Iran 1953, Guatemala 1954, Chile 1973) and of "failures" (Eastern Europe in the late 1940s; Bay of Pigs). Beyond this, the international reputation of the United States has suffered greatly by this persistent pattern of perceived lawlessness. Deep expressions of anti-American popular feelings are powerfully and increasingly manifest in such diverse settings as South Korea, Central

America, and the Middle East. These feelings are significantly connected with the belief that the U.S. Government, especially by way of illegal interventionary diplomacy through the agency of covert operations, is responsible for conditions of domestic repression. Finally, and non-trivially, the costs of international lawlessness at home are considerable and mounting: a divided and disaffected citizenry, widespread attitudes of cynicism and distrust toward official policy, a weakening of fundamental ideas about separation of powers and the primacy of popular sovereignty.

But what about the Soviet Union? Is it justifiable, or was it, to fight fire with fire? First of all, the argument of effectiveness must be first demonstrated, both theirs and ours. If interventionary activities are, on balance, self-defeating, then it is actually a national advantage to refrain from their commission, regardless of what the Soviets do. The Soviet interventionary record looks no more successful than the United States record. The Soviet failure in Afghanistan is only the most dramatic instance of such failure. Outside those contexts of direct occupation, as in Eastern Europe, Soviet efforts to intervene covertly overseas have not yielded any significant results bearing on either regional or global balances of power. Under Chairman Gorbachev Soviet foreign policy seems likely to become more restrained and law-oriented. If Soviet substantial violations of specific treaties in the national security area occur, the United States would be <u>legally</u> entitled to take offsetting steps without necessarily giving notice or repudiating the treaty. That is, fears of becoming asymmetrically trapped by requirements of legal accountability seem unwarranted given the flexibility of treaty law.

The issues of principle involved are also important. The premises of a constitutional democracy accept the notion that governmental accountability to law is inherently valuable even if it is achieved at some cost in efficiency. Extending this rationale to foreign policy seems natural in an interdependent world. As a practical matter two sets of actions are subject to infringement by imposing governmental accountability:

--respect for the constitutional order of foreign countries;

--respect for international treaty rules prohibiting the use of force as an instrument of foreign policy in circumstances other than valid claims of individual and collective self-defense.

To reverse this tide of unconditional, and largely unexamined, deference to national security claims, it seems highly beneficial to impose a serious framework of accountability under law in all governmental operations.

III

The objectives and scope of H.R. 3665 seem responsive to national requirements and to the values of constitutional democracy. Extending officially accountability would enhance respect for government here and abroad, and would give the American people some assurance that their officials were living within the frame of law.

There are some specific issues of approach in the proposed legislation that I would raise for discussion. First of all, in §2902, it seems unduly broad to cast the net here to cover "any intelligence activity." It does not seem desirable, at this stage, to risk allegations of illegality under international treaties for intelligence activities associated with information-gathering. Some of these activities, such as satellite

observation and overseas espionage, undoubtedly raise issues of potential treaty violations--relating to the peaceful use of space, respect for domestic law, abuse of space, and the like. Yet these activities are related to the prevention of the risk of nuclear war and surprise attack, and are part of the accepted, and generally desirable, practice of states. The application of international treaty concepts would seem arbitrary and often harmful. In my view, then, the scope of "National Security Offenses" flowing from "intelligence activity" should be restricted to covert operations, or some like term of art.

There is, also, a question of whether international treaties would be deemed as "self-executing" without further legislative specifications. To make this legislation more resistant to constitutional controversy, it would be helpful to specify the treaties that are to be the basis of this new statutory offense. Such a specification would be sufficient to encompass those offenses done by intelligence officers under a color of governmental authority:

--violations of the laws of war (Hague Conventions of 1899, 1907; Geneva Conventions of 1949; and more specialized treaties to which the United States is a party, for instance, the Biological Weapons Convention);

--respect for the prohibition on the use of force in international affairs (the United Nations Charter, and a variety of regional treaties in the Western Hemisphere);

--respect for the constitutional integrity of foreign states and respect for the treaty rule of international law forbidding intervention in the internal affairs of sovereign states (the United Nations Charter as authoritatively interpreted by resolutions of the Organization and by decisions of the International Court of Justice).

The obligations of treaty law on these offenses are quite clear. The only serious obstacle to assessing violations would involve clarifying contested versions of the facts, a familiar task for law enforcement officials and courts.

There is one final point. The statute as drafted does not incorporate customary international law. It should be noted that the U.S. field manuals governing accountability do encompass customary international law, and the U.S. Supreme Court has authoritatively indicated its applicability to legal disputes in domestic courts. There would be much relevant, reinforcing material in customary international law, especially on the crucial norm of non-intervention. I would, accordingly, recommend that H.R. 3665 be amended to include customary international law, but only as it pertains to specified national security offenses of the sort indicated here.

IV

In conclusion, passage of H.R. 3665 would give great encouragement to all those Americans who believe that a law-oriented foreign policy best serves our interests and values in the modern world. It would also help restore and sustain our confidence in government, and mount a long overdue challenge to the claims of national security policy to be above the law. We need official accountability of governments at least as much in 1988 as we understood we needed it back in 1945.

Statement

of

Professor Jules Lobel, University of Pittsburgh Law School, Representing the Center for Constitutional Rights on H.R. 3665, The Official Accountability Act of 1987

Before

The House Committee on the Judiciary Subcommittee on Criminal Justice, June 15, 1988

Mr. Chairman and members of the Committee, thank you for the opportunity to present this testimony before the Committee on behalf of the Center for Constitutional Rights. The Center for Constitutional Rights (CCR) has long sought to ensure that Executive Officials comply with the rule of law in conducting United States foreign policy. Five years ago, the CCR represented Congressman Dellums in his attempt, pursuant to the Ethics in Government Act, to initiate a special investigation into alleged executive violations of the Neutrality Act in connection with U.S. aid to the Nicaraguan contras. While the Federal District Court ordered such an investigation, holding that reasonable grounds existed to believe that a criminal violation had occurred, its order was reversed on other grounds by the Court of Appeals.[1] Because of its commitment to the principle that Executive officials must not be above the law the Center for Constitutional Rights supports H.R. 3665.

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[1]Dellums v. Smith, 573 F. Supp. 1499, 577 F. Supp. 1449 (N.D. Cal. 1984), overruled on other grounds, 797 F.2d 817 (9th Cir. 1986).

The history of CIA activities since the enactment of the National Security Act of 1947, illustrates that a fundamental conflict exists between what has become known as the national security state and the rule of law. For it is a basic premise underlying the activities of the CIA and National Security apparatus that obedience to law must yield to the national security interests as perceived by the Executive. As former President Nixon explained in a 1977 interview: "If the President . . . approves something, approves an action because of national security, then the President's decision in that instance is one that enables those who carry it out to carry it out without violating a law."[2] Ten years later, Oliver North returned to a similar theme, violations of law are justified by national security interests.

The Iran contragate investigation and report focused on violations of statutes enacted by Congress.[3] Yet, international agreements binding on the United States have also been seriously violated by executive officials in carrying out covert operations in Nicaragua. In 1983, CIA agents authorized and distributed a manual to the contra forces encouraging the assassination of civilians who supported the Nicaraguan government, in clear violation of both an executive order and the U.N. Charter and Geneva Conventions. In 1984, the CIA was responsible for

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[2]Quoted in K. Sharpe, The Real Cause of Irangate, 68 Foreign Policy 19, 35 (1987).

[3]Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 216, H. Rep. No. 433, 100th Cong. 1st Sess. chp. 27 (1987).

mining Nicaraguan harbors, in violation of our treaty obligations under the U.N. Charter, the Charter of the Organization of American States and Treaty of Friendship Commerce and Navigation with Nicaragua. The International Court of Justice virtually unanimously held that both actions violated international law.[4] In neither of these cases involving serious violations of our international obligations were the wrongdoers appropriately punished.

The diversion of funds to the contras from July through October 1986 not only violated the Boland Amendment, it also violated the judgment of the International Court of Justice in Nicaragua v. United States. We are bound to abide by that judgment, pursuant to Article 94 of the U.N. Charter to which we continue to be a party. During the time period involved, Congress had not authorized activities in violation of the ICJ judgment. Yet that violation received no attention from the investigating committee.

The Executive Branch has consistently disregarded applicable treaty obligations in conducting covert operations. A special Presidential committee in 1954 argued that in combatting communism "There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply."[5] President Ford, when asked if the

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[4]Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 25 ILM 1023 (1986).

[5]S. Rep. No. 755, 94th Cong. 2d Sess. 9 (1977) quoting Hoover commission on government organization.

CIA's "destabilization" of the Allende government in Chile violated international law, replied

> "I'm not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that historically as well as presently such actions are taken in the best interests of the countries involved."[6]

This cavalier Executive attitude toward our international obligations is contrary to our constitutional principles. Article VI of the Constitution establishes treaties as the supreme law of the land. Because the Supreme Court decisions have accorded treaties a status equal to that of acts of Congress,[7] the President is required to adhere to the law laid down by those treaties just as he is obliged to obey statutory law. Thus, the Supreme Court has held in Cook v. United States that the Executive power is limited by a treaty,[8] a position supported by the statements of early congressional leaders and statesmen, as well as modern commentators.[9] While the power of the President to terminate a treaty is as yet undecided, the Executive clearly has no unilateral power to amend, modify or breach a treaty. The Church Committee concluded the Executive Branch's authority to

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[6]Presidential News Conference 9/16/1974, 10 Weekly Compilation of Presidential Documents 1157, 1162.

[7]Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Head Money Cases, 112 U.S. 580, 598 (1884).

[8]Cook v. United States, 288 U.S. 102 (1933); United States v. Decker, 600 F.2d 733, 737 (9th Cir.), cert. denied, 444 U.S. 855 (1979).

[9]See sources collected in Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy & International Law, 71 Va. L. Rev. 1071, 1121-29 (1985).

undertake foreign intelligence activities can only be exercised "in accordance with applicable norms of international law."[10] Even John Marshall's famous speech proclaiming that the President is the sole organ of the nation in its external relations, relied on by proponents of broad Executive power, goes on to state that the President is "charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty . . ."[11]

Decisions to breach treaty obligations or customary law have the potential to create international strains and repercussions far more serious than routine foreign policy decisions. Separation of powers concerns dictate that even assuming that such actions are constitutionally permissible, they should be subject to the greater scrutiny provided by a decisionmaking process involving both houses of Congress as well as the president.

In the face of continued Executive resistance to the notion that it is bound to comply with the terms of a treaty as ratified by the Senate--a resistance recently witnessed in the dispute over the interpretation of ABM Treaty--it is vital that Congress clearly establish sanctions for violations of treaties. H.R. 3665 is a welcome attempt to do just that. Criminalizing violations of treaties would hopefully give members of the NSC pause when considering particular courses of action, because they would know that they could be held personally accountable for their actions.

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[10] S. Rep. No. 755, supra at 33.

[11] Report of the Congressional Comm.'s Investigating the Iran-Contra Affair, S. Rep. No. 216, H. Rep. No. 433, 100th Cong., 1st Sess. at 390 (1987).

By providing that Executive officials who violate treaties without Congressional sanction are committing crimes, the statute will aid in enforcing both democratic government at home, and a stable and peaceful international order.

There are three potential objections to a statute such as H.R. 3665 that I would like to address. The first is that criminalizing violations of treaties is unconstitutional because international agreements are often very general and subject to different interpretations. That argument is applicable to many statutes as well; even the Boland Amendment was apparently subject to differing interpretations. Moreover, while international agreements are often drafted broadly and are subject to various differing opinions as to their reach, nations generally agree as to a treaty's core meaning. For example, while there is dispute as to the expansiveness of Article 2(4)'s prohibition against the use of force, all nations agree on certain basic principles. To invade another country is clearly prohibited. Such U.S. actions as the Bay of Pigs invasion, or the Grenada invasion, or mining the Nicaraguan harbors clearly violate those core principles.

The narrowing of somewhat imprecise and broad principles of international law to a universally agreed upon core is not new in American jurisprudence. In 1819, for instance, when Congress enacted a statute prohibiting piracy "as defined by the Law of Nations," serious questions arose over whether this definition was sufficiently precise to permit prosecutions under the act. Justice Story, writing for the Supreme Court, held that it was,

noting that although there may be a "diversity of definitions" of the crime, "all writers concur, in holding, that robbery, or forcible depredations upon the sea, . . . is piracy."[12]

We must not forget that our government believed that certain basic principles incorporated in international agreements were sufficiently precise to impose criminal liability on the Nazis at Nuremberg. Justice Jackson, the United States prosecutor at Nuremberg stated, "if certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."[13]

A second possible objection to criminalizing Executive covert activity in violation of international agreements is that such a bill would prohibit many such covert actions. Indeed, most major Post World War II covert activities violated our treaty obligations. The 1954 CIA sponsored overthrow of the Arbenz government in Guatemala, the Bay of Pigs invasion, the "destabilization" of the Chilean government, the Phoenix program in Vietnam and secret war conducted by the CIA in Laos all involved breaching treaty agreements. Yet, that is an argument for passage of this statute, not against it. Our stated policy is

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[12]United States v. Smith, 18 U.S. (5 Wheat) 153, 161 (1820).

[13]Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, International Org. & Conf. Ser. II, European & British Commonwealth 1, Dept. of State Pub. No. 3080 at 330 (London 1945).

to abide by international law; the time has come for Congress to enforce that policy.

Finally, the Administration argument in the Dellums case, rejected by the District Court, was that the flexibility and discretion required by foreign policy decisionmaking dictated against the application of criminal statutes to that realm. In this whole covert action area executive officials constantly caution against applying clear legal mandates because of the need for flexibility. Yet it is precisely the allowance of Executive discretion and flexibility that has wrought repeated crisis, scandals and policy failures, as the Executive searches for loopholes or skewed interpretations of statutes to undertake policies not supported by the American people, nor openly and democratically debated.

The Iran-Contra Report concluded that "paramilitary covert actions are in a twilight area," where the Executive and Congress have concurrent authority, and in which its distribution is uncertain.[14] I would argue that such is not the case. The framers of the Constitution believed that not only declared wars, but the initiation of lesser uses of force was for Congress and not the President to decide.[15] Thus Article I, § 8, gives to Congress the power not only to declare war, but to issue letters

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[14]Report of the Congressional Comms. Investigating the Iran-Contra Affair, S. Rep. No. 216, H. Rep. No. 433, 100th Cong. 1st Sess. 376 (1987).

[15]Lobel, Covert War & Congressional Authority: Hidden War & Forgotten Power, 134 U. Pa. L. Rev. 1035 (1986).

of marque and reprisal which traditionally were perceived as uses of force short of war.

The constitutional decision to allocate power over the initiation of warfare to Congress, even warfare involving private parties, reflected a substantive judgment on the part of the framers that the use of force against another nation should be made difficult and undertaken only after measured deliberation. The history of covert operations over the past forty years has undermined that constitutional framework. Yet that substantive judgment is equally compelling in today's world, in which war is far more destructive and calamitous than it was in 1787. This statute is a welcome effort to restore the constitutional balance.